

**MARK S. ANTHONY**  
Claimant

**SEARS ROEBUCK & COMPANY**  
Respondent

**KEMPER INSURANCE COMPANIES**  
Insurance Carrier

- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment with respondent, for the injury to his left hip, on the date alleged.
- (2) Whether certain defenses apply.
- (3) The jurisdiction of the Administrative Law Judge to grant the relief requested.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds the appeal filed by respondent from the October 10, 1996, preliminary Order of Administrative Law Judge John D. Clark should be dismissed.

A review of the calendar of events in this matter is necessary in order to understand the decision by the Appeals Board.

This matter originally came before Administrative Law Judge John D. Clark at a preliminary hearing on December 23, 1993. At that time claimant was granted benefits for treatment to his right hip for an injury occurring on May 22, 1993. This matter was appealed to the Workers Compensation Appeals Board which affirmed the award of benefits in its March 17, 1994, Order. There is a dispute raised by both claimant and respondent as to whether the 1993 Order by Judge Clark and the 1994 Order of the Appeals Board dealt with claimant's bilateral hips or only the right hip. The later decisions by Judge Clark render this issue moot.

On May 28, 1996, the deposition of David A. McQueen, M.D., was taken by the respondent. The issue regarding the involvement of claimant's left hip was clearly in controversy at that time. A preliminary hearing was held before Judge Clark on August 13, 1996. At that time the medical report of Dr. McQueen was not placed into evidence even though the deposition had been taken and the medical reports were available. The preliminary hearing record contains discussion regarding the deposition of Dr. McQueen. It is apparent that Administrative Law Judge Clark was aware of the deposition of Dr. McQueen and did take it into consideration in issuing his Order. The issue regarding whether claimant had a right hip injury or a bilateral hip injury was in contention at that time. Judge Clark's Order of August 13, 1996, authorized Dr. McQueen to treat claimant's left hip and further ordered temporary total disability compensation if Dr. McQueen took claimant off work.

Respondent filed a motion to terminate temporary total disability compensation on September 19, 1996, requesting the Court terminate claimant's medical treatment and temporary total disability benefits. This matter came on before Judge Clark on October 10, 1996, from which hearing Judge Clark issued his Order. At the October 10, 1996, hearing respondent admitted the March 17, 1994, Order of the Appeals Board, the evidentiary deposition of Dr. McQueen, taken May 28, 1996, and the medical reports of Dr. McQueen dated February 27, 1996, all of which, as was earlier noted, were available at the August 13, 1996, preliminary hearing.

The respondent lists certain defenses as an appealable issue in this matter, but does not argue which certain defenses apply. The Appeals Board has discussed what is meant by "certain defenses" in past decisions. See Troy Ghramm v. Emporia Construction & Remodeling/Allied Mutual Insurance Company, Docket No. 199,776, (January 12, 1996). The Appeals Board finds no such certain defenses are raised by respondent in this matter and as such respondent's appeal on that issue is dismissed.

The Board must next consider respondent's right to an appeal from the October 10, 1996, Order of Judge Clark as it involves respondent's right to unlimited preliminary hearings.

The Appeals Board has ruled in the past and continues to rule that there is no limit under K.S.A. 44-534a as to the number of preliminary hearings which can be taken before an Administrative Law Judge. However, the Appeals Board has also ruled that unlimited preliminary hearings revisiting the same issue based upon the same evidence would be inappropriate. There is no provision under the Workers Compensation Act for an Administrative Law Judge to review and relitigate his own decision in the absence of new evidence. Absent a reversal or remand by the Workers Compensation Appeals Board, the Administrative Law Judge's preliminary findings are binding until such time as a final award is issued. Respondent's request to terminate temporary total disability compensation and medical treatment were unsupported by any additional evidence in the record. The evidence presented by the respondent at the October 10, 1996, preliminary hearing was available at the August 13, 1996, preliminary hearing from which no appeal was taken.

The Appeals Board finds the Order of August 13, 1996, issued by Judge Clark was a preliminary hearing Order which would have been appealable to the Appeals Board had either party desired to do so. As neither party appealed that matter, it is binding on the parties until such time as the matter is presented for final award or until such time as new evidence becomes available over which the Administrative Law Judge can rule. As such the request by the respondent that the Administrative Law Judge revisit issues already decided, based upon evidence long available, was inappropriate and the October 10, 1996, Order denying respondent's request should be, and is hereby, affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated October 10, 1996, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

---

BOARD MEMBER

c: Russell Cranmer, Wichita, KS  
P. Kelly Donley, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director